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No. 96-940

In the Supreme Court of the United States

OCTOBER TERM, 1996

GEORGE P. POLY AND MAUREEN S. POLY,
PETITIONERS,
v.
THOMAS E. CARGILL, JR. D/B/A
CARGILL ASSOCIATES AND MICHAEL T. MOYLAN,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

RESPONDENTS' BRIEF IN OPPOSITION

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Respondents request that the Court deny the petition for writ of certiorari seeking review of an opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts. The Supreme Judicial Court opinion is reported at 423 Mass. 141, 667 N.E.2d 250 (1996). (For the convenience of the Court, all citations to the opinion will be to the opinion attached as Appendix C to the Petition.)

STATEMENT OF JURISDICTION

This Court cannot properly exercise jurisdiction over this case pursuant to 28 U.S.C. §1257 (a). The constitutional question presented for review in the petition was never presented to the Massachusetts courts. The sole Federal question, under the Federal Tort Claims Act, 28 U.S.C. §2671 *et seq.*, was pre-

sented only in a hypothetical way below. *See* pp. 9-10 *infra*.

STATEMENT OF THE CASE

The Petitioners' Statement of the Case is replete with factual misstatements. The most significant are those relating to the central defects of the Petition: (1) the failure of Petitioners to have presented the purported "constitutional question" to the Massachusetts courts at any stage of this proceeding, (2) the Petitioners' failure to note any of the evidence supporting application of the "discretionary function" exception of the Federal Tort Claims Act, and (3) The Petitioners' failure to note that most of the judgment rests solely on state law grounds.

A. *The Question As Presented to the Massachusetts Courts.*

In this action, Petitioners were required to prove, *inter alia*, that "but for" negligence on the part of Michael Moylan, they would have prevailed in their underlying claim against the Air Force. This element of proof required both the Massachusetts Superior Court and the Supreme Judicial Court ("SJC") to rule hypothetically on Petitioners' theory of liability against the Air Force in the *underlying* law suit, which was, at all times, one of tort, for aiding and abetting intentional interference with custodial rights. The question framed by Petitioners for the purposes of their petition in this Court — that of direct governmental liability for Fifth Amendment due process violations — was simply never presented to, or passed on by, the Massachusetts Courts.[1]

[1] In representing to this Court how the federal question was presented, Petitioners assert that "government officials' actions wrongfully interfered with Poly's constitutionally protected right to a parent-child relationship" (Petition at 6). Throughout the petition, the Petitioners treat this case as if it presented a claim that the government violated their constitutional rights.

Specifically, the underlying suit against the Air Force was brought under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §1346 (b) ("for . . . personal injury caused by the negligent or wrongful act or omission of any employee of the Government"), based on a state law claim of interference with custodial rights. In the legal malpractice complaint, Petitioners alleged only that Poly had retained Moylan in the underlying action "to recover damages suffered as a result of the removal of the children from Massachusetts in violation of court orders which had prohibited his former wife from doing so and had awarded custody of the children to plaintiff", and further alleged that the underlying suit was brought under the FTCA for "negligence" on the part of the Air Force. (Pl. I at 23, *et seq.*[2]). There was never an allegation of any *Bivens*-type damage action for constitutional deprivation by governmental officials. *See Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 386 (1971).

At trial, the dispute on causation centered on whether the Air Force would have been held liable for the state law tort of custodial interference — or whether the FTCA's "discretionary function exception" would have precluded Air Force liability.[3] Although the jury found that Poly "probably" would have been successful in his claim against the Air Force (Pl. II at 564), on Moylan's JNOV motion the court ruled that the Air Force was exempt from liability under the discretionary function exception, as a matter of law (Appendix D). The court made no ruling on the issue of governmental lia-

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[2] The joint appendix below consists of two volumes of pleadings, consecutively numbered, which will be referenced as "Pl. I or II at ____", four volumes of transcript, also consecutively numbered, which will be referenced as "Tr. ____", and trial exhibits, contained in one volume, which will be referenced as "Ex. ____".

[3] In various papers filed with the Superior Court, Petitioners alluded to the fact that the parent-child relationship was "constitutionally-recognized", and certain of their requests for jury instructions touched generally upon that principle. These citations, however, were presented as a foundation for the state law tort claim and were, in any event, *never* discussed as a basis for governmental liability for Fifth Amendment violations, as Petitioners imply here. Nor were they ever presented to the jury.

bility for deprivation of constitutional rights, as that issue was never raised.

Similarly, on appeal, Petitioners had no choice but to frame the relevant issue as whether the discretionary function exception barred a state law tort claim.[4] Thus, the SJC never decided the question of Air Force liability for Fifth Amendment violations, and properly so. On the issue of underlying liability, the court decided the case on the narrow grounds presented, holding only that the trial court acted properly in allowing Respondent's JNOV motion, as the tort claim was barred by the discretionary function exception.[5] Significantly, in their petition for rehearing in the SJC, Petitioners made no argument based on the court's "failure" to reach the constitutional claim which they now assert (Appendix B).

B. *The Trial Evidence As To The Discretionary Function Exception.*

In this case, the allegedly tortious acts committed by the Air Force in aiding and abetting the Gillis' interference with custody were the command sponsorship of Janet Gillis and the two children, the extension of Sgt. Gillis' tour of duty in Germany, and failure to return Sgt. Gillis to the U.S. Petitioners fail to inform the court of critical evidence bearing on these Air Force decisions, which required the conclusion that they were discretionary.

At trial, the dates that the Air Force decided to transfer Sgt. Gillis to Germany and to approve command sponsorship were not established, although the evidence indicated that

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[4] Again, any cases cited on the concept of "intentional interference with a constitutionally protected right" were in support of plaintiffs' *FTCA* claim for aiding and abetting the Gillises, not a direct claim for deprivation of those rights. It is noteworthy that Petitioners never argued below that the discretionary function exception cannot apply where constitutional violations are alleged to exist, an argument which they make in this Court.

[5] The SJC decision discussed what it termed "[t]he underlying *tort claims*" (App. C at 27A) (emphasis added); the terms "constitutional" or "due process" are nowhere mentioned in the court's opinion.

they occurred prior to April, 1979, when the court awarded custody of the children to Poly (Tr. 1304-1305, 1731-32).[6] The SJC merely noted that the reassignment and relocation of the family took place in 1979. In any event, the precise sequence of events was not material in the view of both Massachusetts courts, given the undisputed evidence as to the discretionary nature of the initial transfer decision — as well as the subsequent tour-of-duty extensions — under Air Force policy.

Petitioners ignore the fact that their own military expert, retired Air Force Lt. Gen. Stansberry, testified that decisions regarding command sponsorship and tour extensions are discretionary under overriding Air Force policy to act in the best interests of the country and the Air Force (Tr. 1195, 1199, 1202, 1265-67, 1284, 1363). Respondents' expert, former Assistant Secretary of the Air Force, Karen Keesling, confirmed the discretionary nature of such functions and opined that the Air Force decisions in this case complied with applicable Air Force policy, regulation and practice (Tr. 1723, 1737-40, 1746). Accordingly, both the Superior Court judge and the SJC found no conflicting evidence as to whether the decisions were *discretionary* in character. (App. D at 41A, App. C at 31A and n.6).[7]

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[6] As Respondents argued to the SJC, there was also sufficient evidence to demonstrate that the Air Force did not gain actual notice of the *custody order* until the Gillises had left for Germany. (Tr. 437, 542, 959-60, 1707-1709; Exs. 22, 168-169). However, even accepting Poly's testimony on that fact, the evidence was insufficient to prove the unlawful intent on the part of the Air Force required to sustain a cause of action for aiding and abetting custodial interference. The SJC did not reach this issue.

[7] There was also substantial evidence offered by the Respondents that the Air Force had a clear policy of neutrality with regard to child custody disputes (Tr. 1722, 1752, 1721) and that the Air Force had articulated its policy to Poly in this case (Ex. 16, 20 and 28). Numerous trial exhibits evidenced the policy of neutrality recognized by the Office of the Secretary of the Air Force, the Headquarters of the United States Air Force, and the Judge Advocate General Corps., which governed the conduct of the Air Force during the relevant time period (Ex. 16, 20, 24, 28, 271). In carrying out official policy, the Air Force is exempt from FTCA liability. The SJC acknowledged the evidence as to this neutrality policy, but limited its holding to the related policy that discretionary decisions were to be made in the best interests of

Moreover, the evidence overwhelmingly supported the conclusion that the personnel decisions involved here were discretionary and grounded in policy, namely that they were based on the best interests of the country and the Air Force. By statute, the Air Force was not obligated to return enlisted personnel (and certainly not their dependents) from overseas because of court orders, or even criminal warrants. 10 U.S.C. §814 (the military may or may not deliver members for trial). The governing regulations from 1979 through 1987 allowed the Air Force to refuse to deliver a member of the Air Force for trial of even an aggravated felony offense, if he was stationed overseas. 32 C.F.R. §884.4(d)(1980). Operating Instructions dated May 16, 1983 from the Office of the Judge Advocate General stated that requests for the return of an overseas airman would be reviewed by HW USA/JAJ to determine the best interests of the Air Force (Exs. 71, 334). Similar instructions provided that the Air Force was not required to assist in the service or enforcement of a state court order and even prohibited such assistance in certain circumstances. Civil Law Opinion, Judge Advocate General, July 15, 1986 (Ex. 68).

Air Force Regulations regarding command sponsorship did not require, or even authorize, the official to consider custody disputes in approving the sponsorship (AFR 39-11, §4(d)(3)) (Ex. 213), authorizing payment for dependent travel overseas (AFR 75-8, §1-3) (Ex. 346), or withdrawing the sponsorship (AFR 39-11, §4-14) (Ex. 271). Even if command sponsorship and government paid travel was not authorized, the Air Force could not prevent dependents from moving with enlisted personnel (AFR 75-8, §1-7(a)(2) (Ex. 347). Further, in making tour extensions, Air Force regulations did not require the officials to consider custody disputes or even outstanding criminal charges; recommendation for approval or disapproval was to be based on the judgment of the immediate commander as

the United States and the Air Force, in order to find an *undisputed* basis for its conclusion. (Appendix C at 31A, n.6). Petitioners misrepresent the SJC's statement with regard to the neutrality policy, in footnote 9 of their petition.

to whether it was in the best interests of the Air Force to retain or return the member. AFR 39-11, §4-15 (Ex. 293). Curtailment of tours for cause was limited to serious incidents overseas affecting the mission in the host country rather than legal obligations in the United States. AFR 39-11, §4-17 (Ex. 295).[8]

Given these facts, Petitioners' assertion that no evidence was ever introduced by defendants to show that Air Force officials had discretion to "ignore" the probate court orders is a blatant misrepresentation[9].

C. *The State-Law Grounds For The Judgment.*

While one aspect of the judgment below turned on the FTCA, most of the judgment is based entirely on state law grounds. Petitioners leave the erroneous impression that this Court is being asked to review the entire judgment below. The jury verdict for the Petitioners and against Moylan for $132,000 (Tr. 1965) — set aside by the trial judge and the

[8] Even as of this date, the relevant regulations do not require military personnel to cooperate with civil authorities or to withdraw command sponsorship in cases involving violation of custody orders, although consideration of such actions is encouraged. 32 C.F.R. §884.5 (1995). This fact was noted by the SJC. (Appendix C at 31A, n.7.).

[9] Moreover, the Respondents raised two other defenses to the underlying claim — in addition to lack of intent by the Air Force — which the Superior Court judge ruled would have prevented Poly from prevailing against the Air Force (Pl. II at 756-758). First, the claim was barred under the "foreign country exception" to the FTCA, 28 U.S.C. §268(k), due to actions of the Air Force in Germany upon which Poly's claim was premised. This was the basis on which the Federal District Court dismissed Poly's claim in 1985. Second, the FTCA's statute of limitations, 28 U.S.C. §2401(b), barred the claim as a matter of law. That statute requires that a claim be presented to the appropriate agency within two years after accrual. Since it was undisputed that Poly knew the whereabouts of his children no later than September, 1979 (Ex. 44, 199), and by May, 1981 had come to the conclusion that he had a claim against the Air Force and the Gillises (Ex. 46, 201), the presentment period clearly expired in 1983, before Poly even retained Moylan. The SJC expressly declined to reach these valid defenses, given its holding.

reason for the SJC's venture into FTCA law — is the only aspect of this case which even arguably raises a question for this Court.

Poly's legal malpractice claim against Moylan arose not only from his underlying FTCA claim against the Air Force, but also from his tort claims against the Gillises. The Superior Court judge entered JNOV in Moylan's favor with regard to the claim against the Gillises, as the Petitioners failed to submit any evidence of the collectability of any judgment they would have obtained against the Gillises in the underlying case, as required in a legal malpractice action under Massachusetts law. Moreover, Moylan could not be held liable to Poly for the loss of the claim against the Gillises, since the evidence demonstrated that he withdrew with court approval from representing Poly on that claim, with notice to Poly at a time when this legal malpractice case was already pending and while there was still a viable case to pursue. (App. C. at 32A-33A).

In addition, the SJC ruled on Poly's claim against Moylan for misrepresentation and deceit, vacating the lower court's award of damages based on lack of proof that those damages flowed from the alleged deceitful acts, as required by Massachusetts law. *(Id.* at 33A-34A). The SJC also affirmed the trial judge's ruling with respect to the loss of consortium claim by Maureen Poly. *(Id.* at 34A-35A). With respect to Poly's elaim against Cargill, the SJC held that there was more than adequate evidence to support the jury finding that Cargill did not have the right to exercise control over Moylan's handling of Poly's case, and that Cargill therefore could not be vicariously liable for any negligence on Moylan's part (an issue only relevant if the verdict against Moylan had not been overturned). *(Id.* at 35A-36A). Finally, the SJC found no abuse of discretion in the lower court's conclusion that the Petitioners were not entitled to a new trial under Massachusetts General Laws, Chapter 93A, as the Respondents' actions or omissions failed to constitute unfair or deceptive acts or practices under that statute *(Id.* at 36A).

REASONS FOR DENYING THE WRIT

I. This Case Does Not Present A Substantial Federal Question.

A. *This Case Raises A Hypothetical Federal Question.*

This case was pleaded, tried, and appealed as a state law legal malpractice case. The precise issue presented to the SJC was whether Moylan could have obtained a better result had he exercised reasonable skill and care. This, of course, is the crux of any common law legal malpractice claim. *See Fishman* v. *Brooks*, 396 Mass. 643, 647, 487 N.E.2d 1377, 1380 (1986). The Petitioners have manufactured a constitutional question, never presented below, to interest this Court in reviewing the case. This Court wisely declines to address federal questions never raised or decided below. *See, e.g., Yee* v. *City of Escondido*, 503 U.S. 519, 523-33 (1992); *Beck* v. *Washington*, 369 U.S. 541, 549-53 (1962). Thus, the only conceivable federal question here is application of the FTCA to the particular facts in this case.

While ordinarily this would present a federal question — albeit, not a substantial and important one — the question was raised below in an unusual way. The FTCA claim here is essentially a "fictional" one, a device employed by the Massachusetts court to determine the causation and damages in a legal malpractice case. *See Fishman* v. *Brooks*, 396 Mass. at 647, 487 N.E.2d at 1380 ("The original or underlying action is presented to the trier of fact as a trial within a trial."). The goal of this procedural device is "to determine what the result of the underlying proceeding or matter *should have been*" had the alleged negligence not occurred. R. Mallen & J. Smith, 4 *Legal Malpractice*, §32.1 (4th Ed. 1996).[10] Thus, the SJC was presented with a hypothetical

[10] An alternative device, not accepted in Massachusetts, is to have an expert testify about the settlement value of the underlying case.

FTCA case against the Air Force. "The litigation of a legal malpractice action often thrusts the parties, the judge and the jury into a virtual fantasy world of hypothetical questions of fact and law with assumed plaintiffs and defendants, facing theoretical claims and using evidence that is not quite what it seems." *Id.* Although this is not at all unusual in legal malpractice cases, it demonstrates that the "federal" issue presented in this case is akin to a hypothetical, or advisory opinion, neither of which presents a federal question for review by this Court. *See e.g., Aetna Life Ins. Co.* v. *Haworth,* 300 U.S. 227, 241 (1937) ("[The controversy] must be a real and substantial controversy . . . as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.") Furthermore, it is significant that the Petitioner seeks to have the Court determine whether particular government conduct is within the discretionary function exception to the FTCA in a case in which the government is not a party.

With respect to all of the other issues in this case — the other malpractice claim as well as the fraud, loss of consortium and M.G.L. Chapter 93A claims — there are independent and adequate state grounds to support the SJC's decision. *See supra* at pp. 7-8. At most, this Court can review the SJC's treatment of the $132,000 jury verdict against Moylan and, if it reverses, require the SJC to consider the alternative grounds which it did not reach, including whether there was sufficient evidence to support a state law tort claim against the Air Force for interference with custodial rights. It is well-established that the Supreme Court has no jurisdiction to review where, as here, the non-federal grounds are adequate to support the judgment. *See Herb* v. *Pitcairn,* 324 U.S. 117 (1954).

B. *To The Extent This Case Raises Any Federal Question, The Petitioners' Claims Do Not Warrant Review.*

For at least four reasons, the Petitioners' claims are not sufficiently compelling to warrant review. First, Poly argues little more than that the SJC misapplied a properly stated rule of law. The only federal question Poly raises, and this only hypothetically, is whether the discretionary function exception to the FTCA applies to the facts of this case. It is undisputed that the SJC correctly stated the rule of law as articulated in *United States* v. *Gaubert*, 499 U.S. 315, 323 (1991). The only claim of error is the SJC's application of the *Gaubert* criteria to the facts of this case. The Respondents submit that the SJC correctly applied the rule, but whether the SJC was correct in its application of *Gaubert* is not sufficient to warrant the granting of the petition given that the asserted error consists only of "the misapplication of a properly stated rule of law." Sup. Ct. Rule 10(c). Along with the usual rationale for not spending this Court's time on cases allegedly "misapplying" well-settled legal principles, it is doubtful that federal courts will accord much precedential value to a state supreme court ruling which, because of a procedural quirk, hypothetically applies the FTCA to particular decisions by the U.S. military.

Second, there is no conflict between this and other cases. The only case dealing directly with this issue is consistent with the SJC's decision. In *Burns* v. *United States*, 618 F.Supp. 882, 884 (D. Mass. 1985), the court held that claims against the military under the FTCA arising out of the transfer of military personnel and their dependents were barred by the discretionary function exception. *Burns* is consistent with other cases dealing with the military's liability arising out of personnel issues. *See, e.g., Dare* v. *Secretary of the Air Force*, 608 F.Supp. 1077 (D. Del 1985), *aff'd.*, 787 F.2d 581 (3d Cir.), *cert. denied*, 479 U.S. 846 (1986) (Air Force is not subject to the Parental Kidnapping Prevention Act, 28 U.S.C. §1738A).

It is also consistent with the principle, which this Court has repeatedly recognized, that judges are not given the task of running the military. *See e.g., Orloff* v. *Willoughby*, 345 U.S. 83, 93 (1953); *Parker* v. *Levy*, 417 U.S. 733, 743-44 (1974); *Goldman* v. *Weinberger*, 475 U.S. 503, 506-508 (1985).

Significantly, the Petitioners do not cite the *Burns* case in their Petition. Instead, they manufacture an illusory conflict by mixing cases dealing with qualified immunity under the civil rights acts and cases dealing with the constitutional ramifications of government conduct that has the effect of permanently terminating a parent-child relationship. The result is the proposition that the government cannot permanently terminate a parent-child relationship without due process. This case, however, does not involve a claim under the civil rights acts or the Fifth Amendment, nor does it involve a claim of a permanent termination of a parent's rights.

Third, the law has changed, making a recurrence of the questions in this case highly unlikely. The Defense Authorization Act of 1988 (P.L. 100-456, 102 Stat. 1918) required the military to issue regulations dealing with custody and parental kidnapping. In 1991, the Air Force issued regulations dealing explicitly with these matters. 32 C.F.R. §884.16 (1992). The regulations still give the Air Force discretion over the transfer of military dependents, but it is now encouraged to consider withdrawing command sponsorship if military members or their dependents fail to comply with state custody orders. *See also* 32 C.F.R. § 884.5 (1995). This possibly reduces the likelihood of a recurrence of the events here — and certainly resolves any question as to whether such military decisions are discretionary.

Finally, Poly argues that the SJC failed to consider critical facts and did not accord proper weight to the evidence. (Petition at 16-19). Regardless of the merit of this argument, fact-finding is not the role of this Court. *United States* v. *Johnson*, 268 U.S. 220, 227 (1925); Sup. Ct. Rule 10(c). The facts of this case have been reviewed by the SJC. It is not the function

of this Court to review the facts again. *See Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949) (Court will not review findings of fact "in the absence of a very obvious and exceptional showing of error.").

II. The SJC Correctly Applied the *Gaubert* Standard

The Petition claims (at 16-20) that the SJC misapplied the standard in *United States* v. *Gaubert*, 499 U.S. at 324-325, to the facts in this case. Even if this were a "substantial and important" question requiring the Supreme Court's attention, the SJC correctly decided the discretionary function issue here. The Petitioners equate a difference in analysis — and result — with wrongful conduct by the SJC.[11]

The SJC, to avoid any suggestion that it was deciding the discretionary function issue on disputed facts, very carefully reasoned to its conclusion. The SJC began its analysis by focusing on the Air Force's obligations, if any, to return Sgt. Gillis to the United States because of "court orders or even criminal warrants." (App. C, at 31A). The SJC recited the applicable federal statute, regulations, and case law, which provide that such return is discretionary. The SJC concentrated on the failure to return Sgt. Gillis because, without dispute, applicable law allows the Air Force to "ignore" court orders and even criminal warrants. The SJC implicitly reasoned that if the Air Force were permitted to use its discretion in this circumstance, then the Air Force certainly had discretion to grant command sponsorship or extend tours.

The Petitioners misinterpret the SJC's emphasis on this one aspect of their theory of Air Force wrongdoing. Contrary to the Petitioners' claim that the SJC "misapprehended the offending conduct" (Petition at 17), the SJC was aware that the Petitioners claimed wrongdoing in the initial command sponsorship and referred to this aspect of the claim twice

[11] Petitioners accuse the SJC of "purposeful" misquotation of the *Gaubert* standard (at 19), and of omitting or distorting facts to "camouflage" the Air Force's actions (at 18).

(App. C, n.7 at 31A and at 32A). The SJC could have (as it did with the Air Force's discretion to return Sgt. Gillis) recited the applicable law making discretionary the decision to grant command sponsorship or extend tours in the text of its ruling. For example, the SJC noted in a footnote that even current law does not *require* the Air Force to encourage its members to cooperate with civil authorities or to withdraw command sponsorship in a custody case. (App. C, n.7, at 31A). There is additional support in the record, *see supra* at 5-7, that Air Force regulations leave all these personnel decisions to the discretion of the commanding officer. That the SJC chose not to cite all of these undisputed facts is more a matter of judicial craft than judicial misconduct.

Having established that the decisions at issue were discretionary, the SJC then turned to the "more difficult" issue of whether the discretionary conduct involved policy making or planning. Here, the SJC relied on the undisputed policy that all discretionary decisions involved in this case were to be made "in the best interest of the U.S. and the U.S. Air Force" (App. C, n.6 at 32A). As noted *supra*, even the Petitioners' military expert agreed with this proposition; he testified that this discretionary standard applied with respect to command sponsorship, tour extensions, and return of personnel. From this undisputed basis, the SJC concluded that the Air Force decisions were "grounded in policy." (App. C, at 31A).

Contrary to the Petitioners' claim, the "policy" at issue is *not* to "ignore court orders . . . facilitate parental kidnapping . . . [or to] aid and abet in the intentional interference with" protected rights. (Petition at 19). Rather, the policy, as laid out in the statutes, regulations, cases and internal Air Force guidelines, is to allow the Air Force to accomplish its *military mission*. The Air Force, in exercising its discretion to do what is in the best interests of the Air Force and the United States, may place a higher priority on its military mission than it does on facilitating the enforcement of custody orders.

CONCLUSION

The writ of certiorari should be denied.

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